

STATE OF MICHIGAN
COURT OF APPEALS

JOY L. EBERLINE,

Plaintiff-Appellant,

and

WAYNE JOHNSON,

Plaintiff,

and

FARM BUREAU MUTUAL INSURANCE
COMPANY,

Intervening Plaintiff,

v

NATIONAL CITY MORTGAGE, INC. and
DEFAULT SERVICING, INC.,

Defendants-Appellees,

and

DISTRESS SERVICES and GENE ESSE,

Defendants/Cross-Defendants,

and

MICHAEL AYOUB d/b/a REMAX TEAM 2000,

Defendant/Cross-Plaintiff,

and

MUSTAPHA ESSE,

Defendant.

UNPUBLISHED

July 28, 2011

No. 292022

Livingston Circuit Court

LC No. 06-022513-NZ

Before: SAAD, P.J., and JANSEN and DONOFRIO, JJ.

PER CURIAM.

Plaintiff Joy Eberline¹ appeals by delayed leave granted from the circuit court's orders granting summary disposition to defendants National City Mortgage (NCM) and Default Servicing, Inc. (DSI). Because the trial court properly granted summary disposition in favor of both NCM and DSI, we affirm.

I. FACTS

In 2001, plaintiff and her husband purchased a house by way of a mortgage with defendant NCM. Only plaintiff's husband had secured the mortgage. Plaintiff and her husband then commenced divorce proceedings, in the course of which the husband died, and payments on the mortgage ceased. NCM foreclosed, and purchased the property at the attendant sheriff's sale. Plaintiff commenced action to challenge the foreclosure. A settlement followed, according to which NCM paid plaintiff \$95,000 in exchange for a covenant deed to the property, which plaintiff executed on December 1, 2005. Mutual releases were additionally taken in conclusion of the matter. Neither the covenant deed, nor the mutual release, reserved any rights to plaintiff. And, plaintiff waived any rights in the property when she provided in her release, "waiving all right, title and/or interest to the Property and that neither she nor her Estate will have any claim or right whatsoever in the Property subsequent to the date of this Release." Plaintiff further averred that she told a title company closing officer, a non-party, that she needed about a month to remove her belongings, and she further averred that she relocated on December 10, 2005, leaving some personal property at the premises in issue.

NCM entered into a contract with DSI for DSI to perform real-estate owned services, which are such services that normally follow a foreclosure as inspecting, securing, or marketing the premises. DSI in turn entered into a listing agreement with defendant Michael Ayoub to market the residence, negotiate with potential buyers, and otherwise arrange for a potential sale of the residence. Ayoub then contracted with defendant Gene Esse, owner of defendant Distress Services, to inspect and secure the property. Esse sent his brother, defendant Mustapha Esse, to the house for that purpose. According to the complaint, plaintiff's affidavit and deposition

¹ Plaintiff Wayne Johnson is not participating in this appeal, having asked to be dismissed below. Accordingly, for purposes of this opinion the singular "plaintiff" will refer exclusively to Joy Eberline. The only defendants involved in this appeal are National City Mortgage and Default Servicing, Inc. Defendant Michael Ayoub settled with plaintiff and intervening-plaintiff Farm Bureau, The trial court entered a default judgment against defendants Distress Services, Mustapha Esse, and Gene Esse.

testimony, on December 30, 2005, Mustapha found the garage door wide open, and many personal items in the house that plaintiff had apparently not yet removed. Mustapha notified his brother, who called Ayoub, who advised that they remove the items. Mustapha accordingly took the items home.

Plaintiff commenced the present action, her principal allegation being that she was still in possession of the subject property when defendants and their agents unlawfully entered and removed her personal items. NCM sought summary disposition on the ground that DSI was an independent contractor and thus absolved of any liability for DSI's acts. NCM submitted an affidavit from its mortgage officer attesting that NCM had no rights or control over how DSI performed real-estate owned services, and likewise no control over DSI's subcontractors. In response, plaintiff asserted that when the covenant deed was signed she made it known that she would need a few weeks to relocate, but that it would take place no later than January 1, 2006.

At the hearing on the motion, plaintiff argued that the court should not reach the independent contractor issue on the ground that this was a landlord-tenant dispute. She asserted that when she signed the deed, she became a holdover tenant and, accordingly, NCM had a statutory obligation to secure a writ of eviction before removing her belongings from the premises.

The trial court accepted NCM's argument and granted summary disposition on the ground that NCM was not liable for the acts of its independent contractors.

DSI subsequently sought summary disposition on the same ground. At the attendant hearing, DSI challenged the basis for plaintiff's allegation that DSI should be held liable because it failed to communicate the alleged agreement allowing plaintiff to stay until January 1, 2006 to Ayoub, who failed to communicate it to Gene Esse, who failed to communicate it to Mustapha Esse. DSI argued that there was no such agreement, and offered an affidavit from its operations manager stating that no DSI employee was aware of any agreement between plaintiffs and NCM whereby plaintiff had until January 1, 2006 to move out.

The trial court found that there was no evidence that DSI delegated authority to evict to Ayoub, and that the evidence indicated that DSI contracted with Ayoub for only marketing and sale. The court found no evidence linking any of Ayoub's or the Esses' conduct to DSI, or that DSI was ever told of plaintiff's occupancy. Concluding that there was no material fact in controversy, the court granted summary disposition on the ground that DSI was not liable for the acts of its independent contractors.

Plaintiff now appeals by delayed leave granted challenging the trial court's decisions in connection with both NCM and DSI.

II. ANALYSIS

This Court reviews a trial court's decision on a motion for summary disposition de novo as a question of law. *Archt v Titan Ins Co*, 233 Mich App 685, 688; 593 NW2d 215 (1999). When reviewing an order of summary disposition under MCR 2.116(C)(10), this Court examines all documentary evidence in the light most favorable to the nonmoving party to determine whether there exists a genuine issue of material fact. *Id.* In reviewing a MCR 2.116 (C)(8)

motion, this Court accepts as true all factual allegations in the claim “to determine whether the claim is so clearly unenforceable as a matter of law that no factual development could establish the claim and justify recovery.” *Smith v Stolberg*, 231 Mich App 256, 258; 586 NW2d 103 (1998).

The trial court granted both motions for summary disposition on the grounds that there was no evidence that either defendant had control over its subcontractors, or knowledge that there were indications of plaintiff’s continued occupancy of the subject property, or directed a subcontractor to take any action against plaintiff or her possessions.

A. INDEPENDENT CONTRACTOR

An employer of an independent contractor is generally not liable for the contractor’s negligence. *Bosak v Hutchinson*, 422 Mich 712, 724; 375 NW2d 333 (1985). An exception is where the contract in question is for the performance of inherently dangerous activity. *Id.* at 724, citing 2 Restatement Torts, 2d, § 409, p 370, and 41 Am Jur 2d, Independent Contractors, § 41, p 805. However, the instant case concerns no negligent acts, but rather the intentional conduct of removing the personal property of the possessor of a premises without formal eviction procedures or other legal process. Indeed, the trial court expressed the opinion that the conduct in this instance may have been criminal.

Plaintiff likens the present case to the inherently dangerous activity exception recognized in *Bosak*. Refining the argument to one concerning “the hiring of a contractor to perform acts the contractor’s employer is itself banned by law from doing,” plaintiff cites *Rogers v Parker*, 159 Mich 278, 282-283; 123 NW 1109 (1909), where our Supreme Court approvingly quoted a legal treatise as follows:

If the thing to be done is in itself unlawful, or if it is *per se* a nuisance, or if it cannot be done without doing damage, he who causes it to be done by another, be the latter servant, agent, or independent contractor, is as much liable for injuries which may happen to third persons from the act done as though he had done the act in person. So it is the duty of every person who does in person, or causes to be done by another, an act which from its nature is liable, unless precautions are taken, to do injury to others, to see to it that those precautions are taken, and he cannot escape this duty by turning the whole performance over to a contractor. . . . [Internal quotation marks and citation omitted.]

This statement logically extends beyond criminal behavior to any intentionally tortious conduct.

But key to invocation of this principle is that the conduct at issue be an inherent part of the agreement between the employer and the contractor. In this case, however, there was no evidence that either NCM or DSI hired anyone further down the contracting ladder specifically to violate the law by breaking and entering a home, or to see to the matter of evicting plaintiff by means legal or otherwise. Further, even if eviction of plaintiff was part of what NCM or DSI were contracting for in the first instance, eviction itself is not an inherently criminal, tortious, or dangerous activity, or a nuisance *per se*, that would bring any exception to the general rule of nonliability into play.

Invocation of the inherently dangerous activity exception requires that the hazard was recognizable at the time of the contract, *Bosak*, 422 Mich at 728, or, by logical extension, that the contracted-for activity would result in a crime, tort, or nuisance. But in this case there was no evidence that NCM or DSI contracted for anything other than ordinary real-estate owned services, which are not inherently dangerous, nor likely to result in criminal, tortious, or nuisance-generating activity.

For these reasons, the trial court correctly recognized that no common-law exception to the general rule of nonliability exposed NCM or DSI to liability under these facts.

B. ANTI-LOCKOUT STATUTE

Plaintiff relies on MCL 600.2918(2), to show that removal of her personal property from the subject property was unlawful, and that damages for a violation by an actor's agents may be recovered from that actor. But scrutinizing the statutory language reveals that the statute does not apply to the instant facts.

MCL 600.2918(2) states that damages are recoverable by "[a]ny tenant in possession of premises whose possessory interest has been unlawfully interfered with by the owner, lessor, licensor, or their agents." MCL 600.2918(2)(b) details that "[u]nlawful interference with a possessory interest shall include: the removal, retention or destruction of the tenant's personal property." In this case, however, there was no evidence that NCM and plaintiff ever related to each other as landlord and tenant. The only evidence of record negates a landlord tenant relationship. Plaintiff offers no admissible evidence to the contrary.

For purposes of MCL 600.2918(2), "a 'tenant' is the individual or individuals who pay consideration to the landlord for the right to occupy rental property," as opposed to "the members of the larger family unit dwelling in the rental property." *Nelson v Grays*, 209 Mich App 661, 665; 531 NW2d 826 (1995). Mere possession of premises, then, does not establish a landlord-tenant relationship with the owner of those premises. In this case, plaintiff's deceased husband had an obligation to NCM to pay on a mortgage, but plaintiff herself never had any financial obligation to NCM. Further, the mortgage on the subject property was part of a plan to purchase the fee; the property as plaintiff occupied it was never a rental one. Moreover, plaintiff had earlier settled with NCM, taking a mutual release and signed a deed conveying the premises to NCM without reservation. The closing documents specifically waive any further right in the premises by plaintiff. And plaintiff relocated on December 10, 2005. At the time Mustapha removed the remainder of plaintiff's personal belongings from the premises, plaintiff's earlier conveyance of the property and affirmative waiver left her without an enforceable right. Plaintiff has not demonstrated that MCL 600.2918(2) applies to these facts.

Nor does MCL 600.2918(1), because that subsection concerns a person "ejected or put out . . . in a forcible or unlawful manner," and there is no evidence that plaintiff personally was forced off the premises at all.

For these reasons, we conclude that the trial court correctly granted NCM's and DSI's

respective motions for summary disposition.

Affirmed. Defendants, being the prevailing parties, may tax costs pursuant to MCR 7.219.

/s/ Henry William Saad
/s/ Pat M. Donofrio